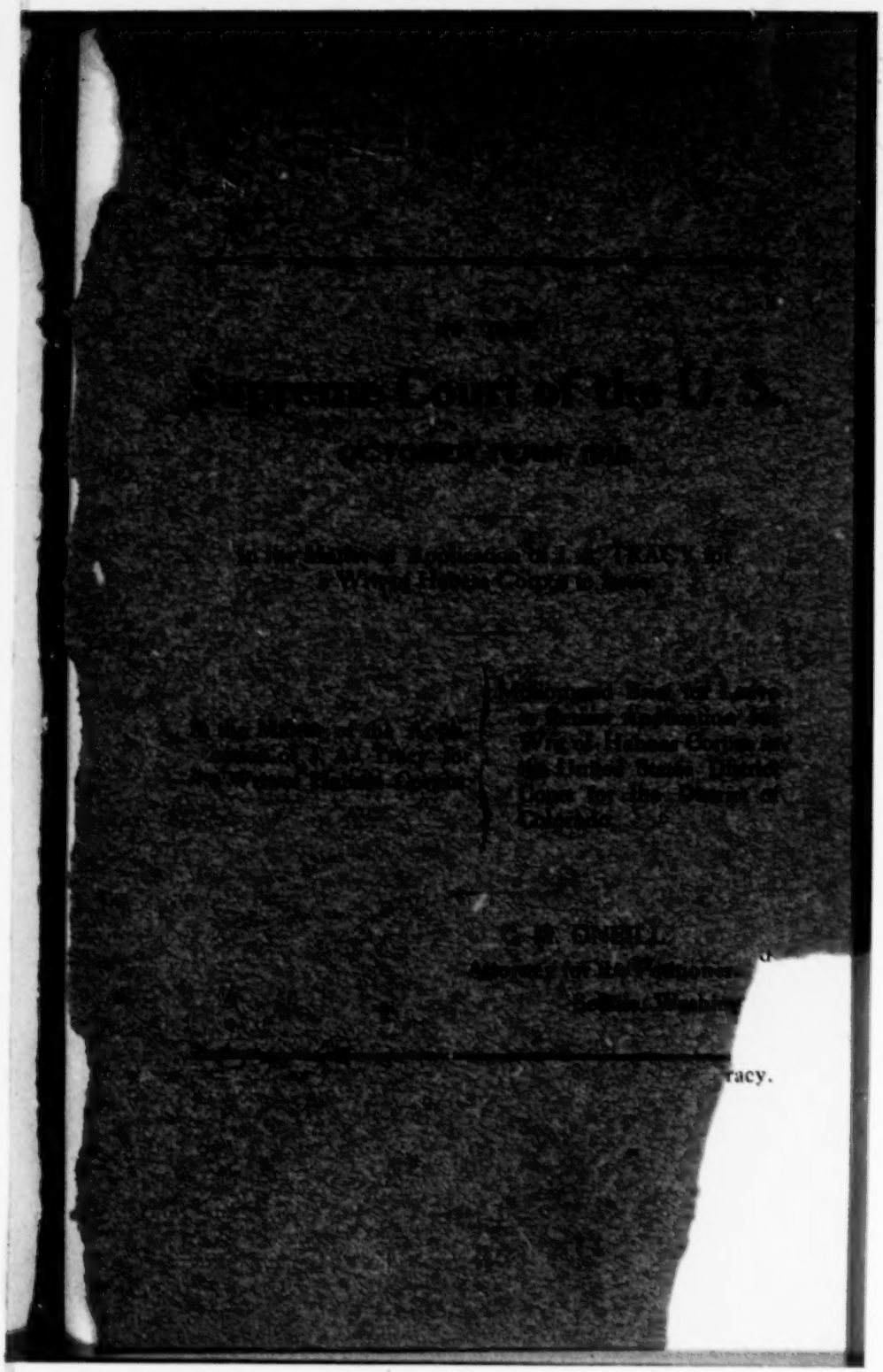

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1918

In the Matter of Application of J. A. TRACY for a Writ of Habeas Corpus to Issue.

In the Matter of the Application of J. A. Tracy for a Writ of Habeas Corpus. | Motion and Brief for Leave to Renew Application for Writ of Habeas Corpus in the United States District Court for the District of Colorado.

(1). Now comes the petitioner, J. A. Tracy, by his counsel, C. M. Oneill, and moves this Honorable Court for leave to be granted to the said petitioner, to renew and to make application for a writ of Habeas Corpus to the United States District Court for the District of Colorado.

And submits therein the accompanying brief.

C. M. ONEILL,
Attorney for Petitioner, J. A. Tracy.

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1918

In the Matter of the Application of J. A. Tracy for a Writ of Habeas Corpus.	Motion and Brief for Leave to Renew Application for Writ of Habeas Corpus in the United States District Court for the District of Colorado.

To the Honorable Supreme Court of the United States:

Comes now the above named petitioner, J. A. Tracy, by his counsel, C. M. Oneill, and respectfully shows to this Honorable Court, in this, namely:

(1). That heretofore a motion was made to this Honorable Court by the above named petitioner, J. A Tracy, asking for leave to file a petition in this Court, praying that a Writ of Habeas Corpus may issue in his behalf.

(2). That leave to file the aforesaid petition praying for a Writ of Habeas Corpus was denied by the Court.

(3). That, the said petitioner is now under restraint in the Colorado State Penitentiary, and desires to make application to the District Court of the United States for the District of Colorado for a Writ of Habeas Corpus.

Wherefore it is prayed and requested, that this Honorable Court grant leave to the petitioner, J. A. Tracy, to make and renew his application for a Writ of Habeas Corpus to the United States District Court for the District of Colorado,

All of which is respectfully submitted.

C. M. ONEILL,

Attorney for Petitioner, J. A. Tracy.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

In the Matter of the Application of J. A. TRACY for a Writ of Habeas Corpus.

Motion and Brief for Leave to File a Petition Praying for a Writ of Habeas Corpus to Issue.

In the Matter of the Application of J. A. Tracy for a Writ of Habeas Corpus. } Motion for Leave to File a Petition Praying for a Writ of Habeas Corpus.

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(1). Now comes the petitioner, J. A. Tracy, by his counsel, C. M. Oneill, and moves this Honorable Court for leave to file a petition praying that a Writ of Habeas Corpus may issue from this Court and submits therein the accompanying brief.

(2). It appearing from the copy of Certified Judgment, procured from and furnished to the petitioner by the Warden and Keeper of the State Penitentiary for the State of Colorado at Cannon City in said State, that the

petitioner did upon the 6th day of January, 1919, commence to serve and is now serving a term of imprisonment for not less than six and not more than eight years in solitary confinement at hard labor in said penitentiary.

(3). That the early and speedy action of this Honorable Court in the premises is earnestly sought and prayed.

Respectfully submitted,

C. M. ONEILL,
Seattle, Washington,
Attorney for the Petitioner, J. A. Tracy.

In the Supreme Court of the United States

OCTOBER TERM, 1918.

In the Matter of the Application of J. A. Tracy for a Writ of Habeas Corpus.	Motion and Brief for Leave to File a Petition Praying for a Writ of Habeas Corpus.

To the Honorable Supreme Court of the United States:

Comes now the above named petitioner, J. A. Tracy, by his counsel, C. M. Oneill, and respectfully makes endeavor to show to this Honorable Court why the application for a Writ of Habeas Corpus should be permitted to be filed in this Court, which reasons and causes are as follows, namely:

STATEMENT OF FACT.

(1). J. A. Tracy, the petitioner, was in the real estate business and locating settlers on public lands, at Ft. Morgan, Colorado. Petitioner made a contract with Tillie A. and Minnie A. Thiede to locate them on 320-acre homesteads, for which they agreed to pay petitioner $300.00 each if they came for location separately, but if they came together and located at one trip and time together the location fee was to be $250.00 each, and petitioner to pay out of this sum, in either case, the land office fees and the surveying of the lands.

(2). That on April 6th, 1916, the petitioner and said Thiedes went to Otero County, Colorado, and the petitioner showed to the view of the said Theides Section 26, Town. 26 South, Range 59 West of the 6th Principal Meridian, in said County and State, which was subject to homestead entry. The said Thiedes being satisfied with said land, Tillie A. Thiede filed on and was allowed the east half and Minnie A. Thiede filed upon and was allowed the west half of said Section 26, and

That before coming to Colorado the said Theides had each sent and paid on their contract for locating, $25.00 apiece, that is, 50.00 to the petitioner.

And at the time of filing on the land in said County and State, they paid him $6.00 for his use, and $44.00 for the filing fee and gave a check on a Nebraska bank for the balance of $400.00, which paid in full these locating fees in the sum of $500.00, as the said Thiedes had come and both located at one time and trip from Ft. Morgan to Otero County, Colorado.

(3). That on the 6th of May, 1916, Tillie A. Thiede went upon the land to establish her residence. She met T. B. Oldham, one Morrison, whose given name is unknown, H. D. Cochran and several other ranchmen and stockmen, whose names cannot be stated because unknown, who did not want the public lands taken and settled by homesteaders breaking up the free range, and discouraged persons offering to do so. These parties led this complaining witness, Tillie A. Thiede, to believe she had been shown the wrong land and located upon some rocky, broken, worthless land, that was worthless for any purpose, and to further believe that the petitioner had deceived her and her sister to secure their money. That one of the said persons, T. B. Oldham, took this complaining witness to the office of the Deputy District Attorney, A. B. Wallis, who, working in concert

with the aforesaid parties, confirmed in this woman's mind that herself and sister, Minnie A. Thiede, had been mislocated on these lands and the petitioner had deceived them to obtain their money.

(4). Affidavits of the complaining witnesses, Tillie A. and Minnie A. Thiede, upon whose sole testimony, uncorroborated, the petitioner was convicted (Exhibits "K" and "L" in the Petition):

EXHIBIT "K."

State of Nebraska,
Kimball County, ss.

Tillie A. Thiede, being first duly sworn on her oath, states:

That she is one of the complaining witnesses in the case of the People vs. J. A. Tracy, commenced at La Junta, now pending on appeal in the Supreme Court of Colorado, cases numbered 9172 and 9173 in that Court; That on the trial of that case I testified that Mr. Tracy filed me on section 26, town 26 range 59 west, but that he showed me entirely different land some distance away, and that we sisters had each paid him $75 apiece in La Junta, in money, and gave the check; I know now that this was all a mistake for the following reasons: when I went out with my brother in May, 1916, to settle, we approached the land from a different direction, walking out from Bloom, and things looked different to me; that night I went on over some five miles or more to Mr. Ayers, the witness, and stayed all night. He never went back with me to show me the land as it is now tried to be made out, but sent me back with a Mr. Morrison who lived just north of section 26; and Mr. Morrison never assumed to show us the land, but from his home pointed off south and west to some high hills and said that was our land and that it was no good, and was all rocks and hills, and that any way we had paid too much and had a right to ask our money back. We believed that and never made any effort except to walk over to those hills ourselves, to find out where our land really was. In going to the land with Mr. Tracy we traveled down the furrow line on the west side section six as related by Mr. Tracy on the stand and when Cochran testified that the furrow was not there, yet he testified to what he knew was not true. In telling Mr. A. B. Wallis about it I simply told him that Mr. Tracy had not showed us our land, meaning that he had not showed us over our land, and Mr. Wallis said that was a fraud, but he never went out and no one else ever did before the trial to show where our land really was and Mr. Wallis forbid us from seeing Mr. Tracy or making any complaint to him whatever, for he said Tracy would only try to show over again and would not pay us. He asked me if Tracy lived at Ft. Morgan and if he was worth anything and I told him he was rich and had farms and

had stock and after I told him all about it he said if we sued him we would have to do it at Ft. Morgan and Tracy would beat us likely, but that he had authority to arrest him and bring him to Otero County and said that was the way to go about it to get our money back. I had no intention of having him arrested when I went to him, but I thought when he paid the money that would be the end of it, and any way it was all done in just a few minutes after I first was taken to his office.

Soon after the trial Cochran, the same H. D. Cochran, had our land contested, and still thinking it was all in those hills was never defended and our entries were cancelled and we still live at North Platte, but since this case has been in the Supreme Court we have gone down to Otero County again and gone out over the real section 26 to find the exact place that we were that day and looked, and we both know now that, after all, we stood with Mrs. and Mr. Tracy that day very near the corner of the real 26 and looked at the real section 26 instead of other land as we were led to testify to and that the hills and rocks we told about is over on another section. Different ones, without attempting to show us, including Morrison and Stewart and others, told us that our land was no good, the country no good, and that Mr. Tracy had mislocated us and charged us too much and we could get our money back and that was the only reason for the case. Of course we were fooled into believing our land was no good, and lay off in those hills, but we know now that it is as good as the rest of the land around there or nearly so, and any way we stood and looked at it and Mr. Tracy offered to take us all over it and we were cold and did not go, but we know now that he did not deceive us. We now find it fenced up in a big pasture and Cochran has beaten us out of it.

We testified, both of us, that we paid Mr. Tracy $75 apiece in La Junta. That was not true. A. B. Wallis told us to say it that way because that was the way he had it in the informations and we thought we had to. I told Mr. Wallis when I went to see him that the land had cost us $250 each, but when I showed him the contracts he said they called for $300 each and we would just leave it that way and Mr. Tracy would be glad to pay the extra amount and that would pay the expense h ewould have to go to in getting it. He forbid my first making any complaint to Mr. Tracy and told me if Mr. Tracy offered to settle it to send him to Mr. Wallis and he would look after it, for if Mr. Tracy made such an offer to us direct it would only be to make it appear that was what the case was commenced for, to make him pay. When the trial came on Mr. Tracy had made no offers yet and that disappointed us and when we went to testify Mr. Wallis told us we had to testify just like it was started out in the papers and he showed us how that was. Now in fact we only paid Mr. Tracy $44 in La Junta to buy our filing fee money orders and $6 more that he kept, making $50 in all and that is what we told Mr. Wallis all the time.

When I got off at the town of Bloom I was disappointed at the size of the place, for Mr. Tracy had told me it was about like Timpass, and that was the way I got from him the impression as to the size of the town instead of his making any direct statement.

Then, too, Mr. Tracy never told me as we looked at the land just what it would raise like we said, but that was what he wrote us about land near Ft. Morgan, and when he first showed us that land we did not want it and went with him to Otero County; he did not say it was only 50 miles from Ft. Morgan, we would know better than that, but he said it was a little over 50 miles from Pueblo we had gone through. When we went out with Mr. Stewart, the witness, we did not really try to find then where Mr. Tracy had taken us, and when we went over some nice flat land Mr. Stewart said that was about it and to testify to that being the place. and we did. I am making this affidavit because it is right to make it and for no consideration of money whatever. I have hopes that we may be able to show this up to the land department and get our entries restored, but as to that we do not know.

(Signed) TILLIE A. THIEDE.

Subscribed and sworn to before me by the said Tillie A. Thiede this 25th day of May, 1918.

W. S. RODMAN,

(Seal) Notary Public in and for Kimball County, Nebraska.

EXHIBIT "L."

State of Nebraska,
Kimball County, ss.

Minnie A. Thiede, being first duly sworn, on her oath states that she is the other complaining witness in the causes referred to in the foregoing affidavit by my sister Tillie A. Thiede and that I have read the full statement of it as she makes in said foregoing affidavit and I personally know that the way she now states it is correct; that Mr. Tracy actually did show us the real 26 like he said and that we paid him only $44 to buy our filing fee money orders and only $6 for him to keep and no more money at La Junta at any time; that the Cochran testimony about the furrow that we traveled down not being there yet was false, and all the other statements just as she makes them I hereby adopt and make them my own and that they are true as I know. I am making this statement out of consideration for no money promise whatever, just because it is the truth and I ought to tell the truth.

(Signed) MINNIE A. THIEDE.

Subscribed and sworn to before me by the said Minnie A. Thiede this 25th day of May, 1918.

W. S. RODMAN,

(Seal) Notary Public in and for Kimball County, Nebraska.

(5). A letter written by A. B. Wallis, Deputy District Attorney, to complaining witness, Tillie A. Thiede (see Petition at page 10), which letter reads, namely:

Office of
John M. Davidson,
District Attorney Tenth Judicial District of the State of Colorado, Pueblo.

Charles B. Hughes,
Lawrence E. Langdon,
Deputies Pueblo, Colo.;
A. B. Wallis,
Deputy La Junta, Colo.;
George A. Marvin,
Deputy Sugar City, Colo.;
N. P. Bishoff,
Special Officer Pueblo, Colo.

La Junta, Colo., May 30, 1916.

Miss Tillie Thiede,
c/o Frieda Thiede,
North Platte, Nebraska.

Dear Miss:

Unless you hear from me to the contrary, I wish that you and your sister would come on so as to be here June 12th the date our court sits. Come prepared to stay several days, your fees and mileage should more than pay all your expenses.

I am also taking this matter up with the United States authorities on the proposition of sending matter through the mail, for the purpose of defrauding and I now write to inquire whether or not your sister or you have the envelopes in which the first letter came from Mr. Tracy. Of course, your original letter I have here, but thought perhaps your sister might have her letter, likewise the envelope in which it came. If she has, I wish she would enclose to me both letter and envelope.

Have you had any communication from Mr. Tracy? If so, wish you would send me what you have from him. Am satisfied we are going to make this case win, and that it will ultimately be the means of your recovering from Mr. Tracy your money.

Yours very truly,

W/P A. B. WALLIS.

(6). Another letter written by T. B. Oldham to complaining witness, Tillie A. Thiede, showing the writer's close relations with the Deputy District Attorney, A. B. Wallis (page 9, in Petition), which reads thus, namely:

(Paragraph 6)

La Junta, Colo., May the 14th, 1916.

Miss Thiede: : : :

Kind Friend: I will write you a few lines in regard to your case here, you must not ans any letters, that that man Tracy may write you, he will bring your letters to cort against you, to show that you was trying to complimise, the case is in the hands of the state, & let them attend to it & you don't want to get into trubble about that part of i, you know he has one thousand dollars in the Bank here in La Junta & your lawyer can attach that attach that thousand dollars here in the bank for you & hold it untill he

pays you what he owes you & for all your expences also. Be shure and don't write to him, nor ans any of his letters. Your sister will have to go down & see the land before the trial comes so she can sware that the land she filed on was not the land that he showed here. Your lawyer will notify you in time for you to come. We both send our best wishes to you & your famely & tell Casy hallo.

Yours Respec.

T. B. OLDHAM,
La Junta, Colo.

R. R. No. 1.

(7). Another letter, written by C. R. Ellison to one Hutchison and used on motion for new trial and settled in the record. Mr. Ellison shows that he, too, had an arrangement with the District Attorney's office to prosecute the petitioner, if he did not pay money. (This letter is at page 113 in Petition.)

Timpas, Colo., 5/30/16.

Mr. J. W. Hutchinson,
Mulvane, Kans.
Dear Sir:—

Just received your letter today; will answer at once. You asked me if I had heard from Tracy since. Yes, I have had a wire from him, and I also saw him in the court room when he had his preliminary hearing. He was in jail a while. He is out on bond to appear before the District Court at La Junta, June 12th. We hope to convict him but if they don't, the District Attorney spoke of taking the matter up with the Federal Court, as it was shown in part of the evidence at the hearing that he used the mail to defraud, by sending out misleading statements as the letters he sent to these girls and myself which read the same, were not only misleading but were actually lies, and then on top of all that, he showed us land in one place and filed us on another. If you have one of those township maps, as I suppose you have, of course you know your land is in Section 21, same as I knew before I got here, but suppose that nice smooth land he showed us down by that fence where he drove up facing the wire, just west of that sheep ranch was it, or at least part of it but instead of that, it is four miles south of that in the Apishapa Breaks, all shale and gravel. Just take your map and find Sec. 3 and 4 in the same township and Range also Sections 33 and 34 in Township 25, Range 59, which is the first land he took us to, where I dug with his spade and you have the exact land he showed up and you never saw the land you got nor neither did I until I pulled out there, for no man can see it from where he took us, as it drops over behind shale bluffs 50 feet high, and he knew he wasn't getting us what he showed us, for he showed these two girls from Nebraska over Section 8 and 12 in same township and went and filed them in 26,

south and east of us, just as bad land. Now the idea is this, they are trying to sinch him for crooked locating, for if he didn't know for sure, he should have found out first, and if he did know, he wanted to keep the wool over our eyes till he spearated us from that $600, and then let us find out to our sorrow after he was jailed he wired me he would show me something else, if I wanted him to, but I didn't want any more truck with him at all. Of course he wanted to get by with that $300, and yet keep me from taking him to it, as the girls had already done, but I had already gotten out a warrant for him and filed it with the district attorney to be served as soon as I said unless he came across to suit me, and then of course I would withdraw the charge and call it off so far as I was concerned, but I wanted him to refund my money, as he hadn't fulfilled his contract and I didn't want him making any more with me until he had.

Well, it is awful dry here now. The grass is no different than it was when you were here and the creek is getting very slim. Well I will close for now hoping this finds you well. I am

Respectfully,

C. R. ELLISON,
Timpas, Colo.

(8). That A. B. Wallis, Deputy District Attorney for Otero County, Colorado, at the October, 1916, Term of the District Court for said County and State, filed two informations against the petitioner, omitting formal parts of copies (pages 11 in Petition), which read as follows, namely:

(Paragraph 8, Petition)

INFORMATION.

John D. Davidson, district attorney, within and for the tenth judicial district of the State of Colorado, in and for the county of Otero, and State aforesaid, in the name and by the authority of the People of the State of Colorado, informs the court that J. A. Tracy on or about the sixth day of April, A. D. 1916, at the County of Otero, State of Colorado, did then and there feloniously, knowingly and designedly, did falsely pretend to one Tillie A. Thiede that a certain tract of land located in the county of Otero, and State of Colorado, was the east one-half (½) of section twenty-six (26), township twenty-six (26) south, range fifty-nine (59) west of the 6th P. M. and that the same was subject to government entry, and was located in a region that without irrigation good crops of alfalfa, kaffir corn, milo maize, and other crops could be successfully grown on the land in said region and locality, and that said lands was located four or five miles from the town of Bloom, a good town, with several stores and good lumber yard, which said false pretenses were then and there made by the said J. A. Tracy,

with the design and for the purpose of inducing the said Tillie A. Thiede to pay to him, the said J. A. Tracy, the sum of three hundred dollars $300.00 for locating her, the said Tillie A. Thiede, upon said land and paying the filing fee upon the same; that the said Tillie A. Thiede, relying upon and believing the said false pretenses to be true and being deceived thereby, was then and there induced by reason thereof to pay to the said J. A. Tracy the sum of three hundred dollars ($300.00), by which said false pretenses he the said J. A. Tracy with intent to cheat and defraud the said Tillie A. Thiede feloniously and fraudulently designedly and knowingly did obtain from the said Tillie A. Thiede the sum of twenty-five dollars ($25.00) in money, of the value of ($25.00), the sum of seventy-five dollars ($75.00) in money, of the value of seventy-five dollars ($75 00), the sum of two hundred dollars ($200.00) by check, of the value of two hundred dollars ($200 00) all of the total value of three hundred dollars, of the personal property, goods, chattels, and monies of the said Tillie A. Thiede; whereas, in truth and in fact the said tract shown to the said Tillie A. Thiede was not the east one-half (½) of section twenty-six (26) in township twenty-six (26) south, range fifty-nine (59) west of the 6th P. M. and was not land that was subject to government entry and was not land upon which good crops of alfalfa, kaffir corn, milo maize and other crops could be grown, and that the true location of the said east one-half of section twenty-six (26) in township twenty-six (26) south, range fifty-nine (59) west of the 6th P. M. was other than the location shown to the said Tillie A. Thiede, and was rough hilly land and not so desirable as the tract shown the Minnie A. Thiede by the said J. A. Tracy, and that the said town of Bloom did not possess a lumber yard and had but one small store; all of which said false pretenses he, the said J. A. Tracy, at the time he so falsely pretended as aforesaid, well knew to be false, contrary to the form of statute in such case made and provided and against the peace and dignity of the people of the State of Colorado.

JOHN W. DAVIDSON,
District Attorney.
By A. B. WALLIS,
Deputy District Attorney.

These two informations are alike except that Tillie A. is complaining witness in one and Minnie A. Thiede is such witness in the other (pages 11 and 12 in Petition).

(9). That at the October, 1916, Term of said Court these informations were tried together and verdicts of guilty returned and the petitioner imprisoned in the county jail and so kept until after March 14th, 1917 (page 23 in Petition).

(10). That acting as his own counsel and in said jail, the petitioner on December 16th, 1916, filed motions for new trials (page 24 in Petition).

That in support of said motions for new trials was offered and filed the following, namely:

a. The evidence of Tillie A. and Minnie A. Thiede (pages 54 and 55 in Petition).

b. The affidavits and letters set forth at pages 47 to 118 and page 177 in the Petition.

(11). That on December 18th, 1916, motions for new trials came on for hearing.

(12). It was stipulated in open court, of record between petitioner and District Attorneys C. B. Hughes and A. B. Wallis, that one William J. Hardesty be sworn and testify orally and his testimony recorded and considered by the Court in lieu of an affidavit.

(13). That said Hardesty was sworn and testified in resistance to such motions, and his testimony was recorded by the Official Reporter to the Court, by question and answer, which in narrative form is as follows, namely:

(14). "My name is William J. Hardesty. On or about the 25th day of April, 1916, I plowed the furrow around my own land in Section 31, Township 25 North, Range 58 West of the 6th P. M. Said section lay adjoining Section six on the north. Haley P. Maize and Sherlie Cormack assisted me in plowing the furrow around Section 31, in plowing the furrow on the west side Section 31. We ran the furrow from the north running south, and on reaching Section six I did not see any furrow running south on the west section line of Section six, and do not know of my own personal knowledge just when Cormack and McMurray plowed the furrow down the west line of Section six, and rely for information as to when it was plowed upon statements made to me by Carmack and

McMurray, and never in fact saw the furrow as I plowed my furrow around my own land." (Page 118 in Petition.)

(15). That after the said Hardesty had testified, the Court ordered the testimony stricken out and granted leave to the prosecution to file the said Hardesty's affidavit over the objection of petitioner.

That, soon after and on the same day, December 18th, 1916, the said Hordesty, believing he was signing a receipt for his witness fees in said causes, and at the request of and in the presence of A. S. Marshall, signed his name to a paper.

(16). That thereafter there was filed in resistance to said motions for new trial by the prosecution an affidavit with the name of William J. Hardesty thereon, sworn to before A. S. Marshall, Clerk of said District Court, upon December 18th, 1916. Said affidavit (page 119 in Petition) reads as follows, namely:

(Paragraph 16)

State of Colorado,
County of Otero, ss.

William J. Hardesty, being first duly sworn, oath, deposes and says:

That he resides on Section Twenty-eight (28) in township Twenty-five (25) South of Range Fifty-eight (58) West of the 6th P. M. in Otero County, Colorado; that he has there resided at all times since the 1st day of April, A. D. 1916; that on account of one Jeter Arnold bringing sheep into the above locality, the settlers deemed it advisable to plow around their holdings so that he would not run his sheep upon their lands, to advise him where their lands were; that previous to that time there were no furrows plowed around the lands in that locality; that affiant had a headgate on Sec. 31, twp. 25, Range 58 West of the 6th P. M., and therefore on the 25th day of April, A. D. 1916, plowed a furrow a furrow around said section 31; that on said 25th day of April, A. D. 1916, there was no furrow on the North, West or East side of Section ix (6) Township 26 South of Range 58 West of the 6th P. M.; tha tsaid section 6 adjoins on the south the said section 31 aforesaid; that Haley P. Maize and Sherlie Carmack assisted me in plowing the furrow around said section 31; that later affiant, some days after, affiant discovered that a furrow had been plowed around said section six (6); that affiant advised his neighbors Mc-

Murry, Maize and Carmack to make furrows around their lands after the Arnold sheep were brought into the locality, and the furrows were afterward made on that account; that the Arnold sheep were brought into the said locality on April 15, A. D. 1916; and further affiant sayeth not.

(Signed) WILLIAM J. HARDESTY.

Subscribed and sworn to before me this 18th day of December, A. D. 1916.

A. S. MARSHALL,
(Seal) Clerk of the District Court.

(17). That said affidavit is positively contradictory of Hardesty's oral testimony, that was struck out by the Court.

(18). That thereafter the said William J. Hardesty made an affidavit (pages 243 to 246 in Petition), which reads as follows, namely:

In the Supreme Court of the State of Colorado.

J. A. Tracy,
Plaintiff in Error,
vs.
The People of the State of Colorado,
Defendant in Error.

Affidavit of William J. Hardesty.

State of Colorado,
County of Otero, ss.

I, William J. Hardesty, being first duly sworn and cautioned to speak only the truth on my oath, state:

That I am the same William J. Hardesty who testified orally under oath in the District Court in and for Otero County, Colorado, on December 18th, 1916, in the matter of the hearing of the motion for new trial by the defendant, J. A. Tracy, in the above entitled matter before Hon. C. S. Essex, Judge, and the same William J. Hardesty referred to by the learned judge in his decision of said motion as rendered on January 25th, 1917.

That I was not present when said decision was rendered, have not seen the same, and am not informed upon what ground the same was based.

That at the request of C. D. Steward, the former deputy sheriff of said county, I was present at the hearing on the said motion for new trial, throughout the entire hearing thereof and took notice of some of said proceedings and have personal knowledge of the following facts:

That near the close of the day, at the close of the argument of the defendant, J. A. Tracy, upon his argument in chief in support of the motion, it was orally agreed between said defendant and Charles B. Hughes and A. B. Wallis, representing the People, that

I be sworn and testify before the judge as a wtiness instead of filing my affidavit.

Thereupon the reporter of the Court, one A. J. Beaumont, was called from an adjoining room by said Charles B. Hughes and took his seat in the accustomed place for the purpose of taking down my said testimony and I was duly sworn by the Clerk of the Court, one A. S. Marshall, and testified in the presence and hearing of the learned judge in effect regarding the existance of a certain furrow down the west line of section six, township 26 south, range 58 west of the sixth P. M. as follows:

That on or about the 25th day of April, 1916, I plowed the furrow around my own land in section 31, township 25 north, range 58 west of the 6th P. M.; that said section lay adjoining section six on the north; that Haley P. Maize and Sherlie Carmack assisted me in plowing my furrow around said section 31; that in plowing the furrow on the west side of section 31 we ran the furrow from the north running south and that on reaching section six I did not see any furrow running on south on the west line of section six, but I did not say it was not there at that time. On coming to the Court that morning, having no personal knowledge as to the exact date when the furrow was made down the west line section six, township 26 south, range 58 west, I asked Sherlie Carmack in the hall of the Court when he plowed that furrow and he informed me that he plowed the same on or about the 28th day of March, 1916; that said Carmack and McMurry are truthful men and I have no reason to doubt the correctness of their statements; that I so informed said Charles B. Hughes and A. B. Wallis, attorneys for the People before I was sworn and testified and the substance of my testimony was that I plowed the furrow around my land in section 31, township 25 north, range 58 west on about the 25th day of April, 1916, and did not know of my own personal knowledge just when Carmack and McMurry plowed the furrow down the west line said section six, and that is the way I want now to be understood.

In truth, I am since informed that there is a jog in the section lines at the intersection of the west line of said section 31, and the west line of said section six, and that the west line of section six lies about ninety feet to the west of the west line of section 31; that in making the furrow down the west line of my section, namely, said section 31, I plowed straight south using the Carmack house as a guide but that it sets to the east of the west line of section six and the furrow down that line by about ninety feet, and that is the reason that in looking on south as I approached section six I did not observe the furrow at that time, because the furrow down the west line said section six lay off to the west by about ninety feet from the furrow I was making. I do not say upon the stand at said hearing I knew when it was plowed down the west line section six, but only that I plowed the furrow down the west line section 31 on or about April 25th, 1916. In fact, I never did see the furrow down the west line section six till some time in September, 1916, in passing that way and had no personal knowledge when it was made, and relied for my information on Carmack and McMurry and so testified at said time before said

judge on the hearing of said motion and so informed said Hughes and Wallis before testifying and want to now be so understood.

That while testifying said A. J. Beaumont sat there and took my testimony down just as I now relate it according to the agreement that I should give my testimony instead of giving an affidavit.

That John Z. McMurry and Sherlie Carmack sat in the back of the Court; that J. A. Tracy requested Hughes, at the close of my testimony, to satisfy himself in regard to the furrow by calling Carmack and McMurry and cross examine them; that Hughes made no answer and the defendant requested the Court to require Hughes to call said men, but the Court would not, saying that he did not propose to retry the case upon the motion for new trial, and that their affidavits were on file; that there were but few persons present in the Court at the time.

Some time after the close of my testimony I signed a receipt for my fees as a witness in the presence of said A. S. Marshall, at his request, and that is all that I remember that happened that day in which I was concerned. I am not an educated man, but can read and write and understand when I take time to figure a thing out; that I have read this affidavit and have kept a copy of it and know just what it says and what it means and every word of it is the truth.

That I am making this affidavit at the request of J. A. Tracy without any reward whatever, not knowing just how or whether it may benefit him just because it is true.

(Signed) WILLIAM J. HARDESTY.

Subscribed and sworn to before me by said William J. Hardesty on this 1st day of May, 1916.

E. LAVERN McKELVEY,
Notary Public.

(Seal)
Com. Exp. Sept. 3rd, 1918.

(19). That this affidavit shows that Hordesty did not know he was signing an affidavit on December 18th, 1916, in which he contradicted his oral evidence given on the hearing of motions for new trials.

(20). That the hearing upon new trial was continued on December 18th, 1916, without day, that the prosecution might make resistance to the petitioner's showing for new trial.

(21). That between December 18th, 1916, and January 25th, 1917, the said A. B. Wallis, Deputy District Attorney, and C. B. Hughes, District Attorney, procured and submitted to the Court's consideration, unknown to

the petitioner, in resistance to said motion for new trial, nineteen affidavits, nine letters and a resolution of a Bar Association (pages 121 to 157, in Petition, Exhibit "A" to this motion).

(22). That during all this time petitioner was in a cell in the said county jail and the District Attorneys and Court knew this fact; that copies of these affidavits, letters and bar resolution was not served on the petitioner until

(23). The hour of 5:30 P. M., January 24th, 1917, and the petitioner having no notice that the Court would decide the motions for new trials January 25th, 1917, until the hour of 10.30 A. M. on said day, when he was taken to the court room from the jail by an officer. That during the night, in his cell, petitioner prepared a rebuttal affidavit (pages 177 to 181 in Petition, Exhibit "A" to this motion), and filed this affidavit on entering the court. That it was not considered, as the Court at once read his opinion already written denying the motions (pages 158 to 175 in Petition, Exhibit "A").
Petition Exhibit "A" to this Motion), and filed this affidavit on entering the court. That it was not considered, as the Court at once read his opinion already written denying the motions (pages 158 to 175 in Petition, Exhibit "A").

(24). That the service of these 19 affidavits, 9 letters and bar Association resolution at the late and unseasonable hour of 5:30 P. M., on January 24th, 1917, without ~~that time~~any notice given to the petitioner that the Court would decide the motion at 10:30 A. M., January 25th, 1917, and the first knowledge petitioner had that the Court would decide the motion at that time, was given him by an officer that unlocked his cell to take him into the presence of the Court.

(25). That these proceedings denied to the petitioner an opportunity to make any defense to this mass of matter produced in resistance to said motions for new trial, or any showing to the prejudicial matters contained in the statements set forth in these affidavits and letters.

(26). That the substantive rights of the petitioner were abridged, and he was denied the right to have the usual, orderly and common methods of procedure allowed and practiced upon motions for new trials in his motions and hearing. A survey of the matter before the Court upon these motions and recognized by the Court, in a long and exhaustive opinion in detail, is not compatible with the elements of a fair trial and hearing. Locked in his cell, the petitioner labored under an unequal chance to meet the attacks of the prosecution. He was entitled to seasonable notice and an opportunity to be heard. When this was not allowed, but denied, the Federal Law instantaneously commenced to act and he was denied due process and equal protection of the law.

(27). **That upon motions for new trials being denied, the petitioner was sentenced to the penitentiary of Colorado.**

(28). That after sentence the petitioner engaged new counsel, to remove said causes on writ of errors to the Supreme Court of Colorado.

That such counsel made an effort to get the record containing the oral evidence of William J. Hardesty, given on the hearing December 18th, 1916, of the motions for new trials. Application was made to the Official Court Reporter, A. J. Beaumont, who stated no record was made and kept of Hardesty's testimony, and such record was not secured for this reason and settled in the bill of exceptions.

(29). That a bill of exceptions of the obtainable record was made and settled and errors assigned thereon, Exhibit "F" attached (and pages 186 to 198 in Petition), and the causes removed to the Supreme Court of Colorado, and made a supersedeas and bail allowed and the petitioner enlarged about March 20th, 1917.

(30) That said Supreme Court submitted said causes to three Justices of that Court for decision, and on May 6th, 1917, said Justices affirmed the convictions, Exhibit "J" attached to Petition (pages 201 to 207).

The informations do not charge any offense. A defense could not be made to them. A conviction on acquittal under them could not, upon a second prosecution, be made a defense of formen jeopardy.

(1). It is essential to the jurisdiction of the Court, that an offense, known to the law, be made in the charge of crime in the informations.

(2). It is alleged in these informations that the petitioner "Did falsely pretend," etc. This is different from a false pretense. There are no averments that any representations were made whatever.

8 Enc., Pl. and Pr., 865.

"Did falsely pretend" is but a false affirmation.

State vs. Holmes, 82 N. C. 607.
Com. vs. Hoover, 6 Lanc. Pa. 129.

It is not permissible to convict on inference; must directly, plainly and specifically charge the crime.

State vs. Reeve, Montana, 75 Pac. 636.
State vs. Nelson, Minnesota, 82 N. W. 650.
State vs. Clark, Iowa, 119 N. W. 719.
Moline vs. State, Neb., 93 N. W. 228.

The false pretense must be charged and must also charge the property was acquired by means of the false pretense.

Norris vs. State, 25 O. St. 217.
Cowan vs. State, 24 Neb. 519.
State vs. Conner, 110 Md. 469.
Epperson vs. State, 47 Tex. 79

These informations nowhere describe or point out definitely the land that is alleged to have been shown under the averment "did falsely pretend to one Tillie A. Thiede that a certain tract of land located in the County of Otero, and State of Colorado, was the east one-half of Section 26, Town. 26 South, Range 59 West of the 6th P. M., and the same was subject to Government entry."

And then, under a "Whereas" it is attempted to be negatived by an allegation that this unknown, uncertain tract "was not land that was subject to Government entry and not Government land.."

In a trial under the informations, one of these women might base her prosecution on the claim that petitioner showed her one piece of land, and the other one might make her prosecution on the claim that the petitioner showed her an entirely different parcel, while both admitted, at all times, they were together when the land was shown, and same tract shown both.

An examination of the evidence, Exhibit "B," attached to the Petition, shows that this was exactly what occurred at the trial.

From the averments of the information the petitioners cannot know what land the prosecution claims he showed and "pretended was Government land and open to entry."

And if the prosecution did not know what land it was, it cannot be determined whether it was or was not Government land and subject to settlement or not. No proofs

could be offered in support of it because the land is unknown. The petitioner could not meet it because he was not charged with its location.

There is not one word of evidence in the record describing this unknown land, or as to its being Government land, or not, or as to its being open or not open to settlement.

This alleged "certain tract of land in Otero County, Colorado," etc., is the primary element in the offense charged, if any. The lack of its description conclusively barred the inquiry and proofs of the petitioner to its character and quality, as to being Government land, or subject to settlement. This was vital and involves the principles:

a. To be informed of the nature and cause of the accusation, and enable the petitioner to make his defense.

b. To have the privileges of the pleas of former jeopardy.

It is nowhere alleged these women filed on or took any land at all.

And it is not alleged showing any relation for the money paid and any object for which so paid.

There are no averments showing these complaining witnesses had any qualifications to enter public lands, and,

a. That they were citizens of the United States;

b. That they were either married or single, and,

c. That they were of legal age.

It is submitted that these informations involve the jurisdiction of the Court to proceed to a valid judgment. The petitioner could not be afforded a fair trial when not apprised of the charge. The transaction is not identified.

Section 16, Article 11, of the olorado Constitution and Amendment VI to the Federal Constitution are but a re-

declaration of the Common Law, that the nature and cause of the accusations be set forth with precision and fulness, that defense may be made, and that the acquittal or cnoviction may be made a defense in a subsequent prosecution for the same cause.

Fehringer vs. People, 59 Colo. 7.

The judgments are void for these further reasons. The three Justices of the Colorado Supreme Court, in their opinion deciding these cases, say: "The defendant having obtained their money by pretending that certain land was Section 26, and part of the public domain, when it was not such section, and was not open to public entry, it makes no difference, as matter of law, whether the prosecuting witnesses thereafter located on the real Section 26, or whether they located on any Government land at all. They were precluded from locating upon the tract shown them by defendant, who obtained their money by his knowing false assurance that he would secure them the section he showed them."

This opinion is based upon this undescribed land mentioned in the informations. There is not one word of evidence in the record, Exhibit "B," attached to the Petition, as to this undescribed land being or not being Government land. Yet, those Honorable Justices affirmed th ecases on the fact, it was not Government land and not subject to entry. The petitioner was not charged with the identity of this land and was unable to meet it, and the said three Justices, to affirm the convictions, assumed facts not in the record or even attempted to be shown by the prosecution.

This assumption of matters in the record that it does not contain involves the question of a fair trial and the jurisdiction of the Court to render a valid judgment and is a denial of due process and equal protection of the law

affecting the fundamental rights of the petitioner under the Federal Constitution.

The adjudication in the Supreme Court of Colorado must be based upon matters in the record. It is not a trial de novo, additional averments, or evidence or ex parte maters cannot be introduced.

Luthe vs. Luthe, 12 Colo. 421.
German Nat'l Bank vs. Elwood, 16 Colo. 244.

(31). That the time for filing a rehearing petition was extended to June 5th, 1918.

(32). The petitioner acting for himself, made and filed with proofs of service on the Attorney General of Colorado his petition for rehearing, Exhibit "C" attached to petition praying for rehearing, pages 390 in Petition.

(33). That in answer to the petition the Attorney General aforesaid saved his brief, Exhibit "D" attached to petition.

(34). That a reply brief was served to the answering brief, Exhibit "E" attached to Petition, page 393.

(35). While said causes were pending on petitions for rehearing, and not gone to final judgment, and on May 25th, 1918, the petitioner learned that the complaining witnesses had made a disclosure of the corrupt methods and means used through conspiracy and false swearing, to which the Deputy District Attorney A. B. Wallis was a party, and had used the criminal process and laws of the State of Colorado to convict the petitioner of the offenses charged in the informations.

(36). That, on said day, May 25th, 1918, Tillie A. and Minnie A. Thiede severally made affidavits setting forth such facts, they being the two witnesses whose evidence uncorroborated, convicted the petitioner, being exhibits

"K" and "L" in the Petition, and set forth in this brief in the statement of case, *supra*.

(37). That while the petition for rehearing was yet pending and before final judgment, the petitioner moved the Court upon notice, petition and affidavits for an order suspending proceedings, that he might move the trial court to reopen the motions for new trial and submit the newly discovered mistaken testimony, perjury and its subornations, and leave to settle and file an amended and supplemental bill of exceptions and leave to abstract and to newly assigned errors thereon (exhibit "G," page 211 in Petition).

(38). That before final judgment and on June 15th, 1918, the petitioner moved the said Supreme Court for an order and leave to recommit the bill of exceptions and said causes to the trial court that an amended bill of exceptions might be made and settled to contain the testimony of William J. Hardesty, given orally, and proceedings stayed for this purpose (exhibit "H," page 231, in Petition).

(39). That, on December 2d, 1918, the said three Justices of said Court denied the petition for rehearing and the motions aforesaid (exhibits "G" and "H," attached to Petition).

(40). That, on December 4th, 1918, the petitioner served on the Attorney General of Colorado a motion, petition and affidavits praying the Supreme Court of Colorado to vacate and set aside the submission of said causes upon rehearing, to the Department Three of said Court, and to set aside the former submission of said causes upon the merits to said division of the Court, and to set aside the judgment of said division of the Court heretofore rendered upon the merits and the petition

for the rehearing, and for an order o fthe court submitting these causes for consideration and determination by the full bench of the Court as provided by law (exhibit "I" attached to the Petition).

(41). That the said three Honorable Justices refused to permit the clerk of said Supreme Court to file said motion in said causes in the office of the clerk of said Court. That no action was obtainable on said motion by said Court, and the fundamental rights of the petitioner withheld and due process of law and equal protection before the law denied, contrary to the Fourteenth Amendment of the Federal Constitution.

(42). That about December 6th, 1918, a mandate issued from the clerk's office to the District Court of Otero County, Colorado, to execute the judgments, and the petitioner was placed under restraint in said penitentiary under the final judgments (exhibits "1" and "2" in the Petition).

(43). That the judgments of conviction of the petitioner in the District Court for Otero County, Colorado, upon said informations are void, for these reasons, namely:

(44). That A. B. Wallis, Deputy District Attorney, for Otero County, in said State, was an officer of said State and vested with the powers of the State to exercise actions and control of the use and application of the criminal process and laws of the said State, for the prevention and punishment of crimes and offenses committed in the violation of the criminal laws of said State, in Otero County, Colorado.

(45). That it is alleged in the petition that A. B. Wallis, Deputy District Attorney, entered into a corrupt design and conspiracy with several persons therein

named, the purpose and object of which was to secure the arrest of the petitioner and coerce him to pay money, and if not paid to convict him of the effenses charged in these informations.

(46). That the petitioner was convicted upon the sole and uncorroborated evidence of the two complaining witnesses, Tillie A. and Minnie A. Thiede. It is alleged in the petition that this evidence was false and perjured, and that the Deputy District Attorney, A. B. Wallis, induced and procured these witnesses to testify falsely to prove the charges in these two informations, and that the conviction of the petitioner was secured in that manner. That said convictions are illegal and void and violate the fundamental rights of the petitioner to due process and equal protection of the law under the Federal Constitution.

(47). A State acts by its officers in its various departments and such acts are those of the State.

C., B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226.

(48). And it is submitted that this Court has the authority to look into and to go behind these proceedings culminating in these convictions, and if necessary to go outside the record to ascertain the truth and test the jurisdiction of the court rendering judgment.

Frank vs. Mangham, 237 U. S. 308.
Hans Nielsen, 131 U. S. 176.
In re Cuddy, 131 U. S. 280.
In re Mayfield, 141 U. S. 107.
Whitten vs. Tomlinson, 160 U. S. 231.
In re Watts and Socks, 190 U. S. 135.
In re Virginia, 100 U. S. 339.

(49). When questions of fact are so interwoven with

constitutional rights that one necessarily involves the other, the Federal courts must examine the facts.

K. C. S. Ry. vs. Allers, 223 U. S. 573.

(50). Though the law on its face be fair and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo vs. Hopkins, 118 U. S. 373.

C., B. & Q. Ry. Co. vs. Chicago, 166 U. S. 226.

McGehee's Due Process Law, p. 28.

(51). The fact that the Deputy District Attorney, in these causes, wrote into these two informations the corrupt and false charges of crime, and formally filed them in the court, and upon the trials made proofs, by false and perjured testimony, induced and procured by such officer, and thereby secured the conviction of the petitioner, did not give the Court jurisdiction to proceed to valid judgments in these cases.

(52). The State cannot, regardless of and unrestrained, violate through its officers, the fundamental and established principles of private rights arising out of and guaranteed by the Fourteenth Amendment to the Federal Constitution, by the exertion and exercise of power and the use of its criminal laws by its officers, to arbitrarily discriminate and to take away from and withdraw from the petitioner his liberty, security, equal protection under equal laws and the due process of law in the State of Colorado, through the wrongful acts and doings of its Deputy District Attorney, in performance of his official duties in the institution of and prosecution of these causes, as the State itself cannot fabricate a crime

and suborn witnesses to establish the borrowed facts and secure through its courts a valid judgment, and if it does so the Federal Constitution instantaneously commences to act and the judgments are void, there not having been a constitutional trial, such judgments having been obtained by and through a conspiracy to which the State was a party acting by its officers to secure conviction of the petitioner in these causes.

It is firmly established that if the court which renders judgment has not jurisdiction to render the judgment, either because the proceedings or the law under which they are taken are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally, and the defendant discharged.

Hans Nielsen, 131 U. S. 176.
Ex parte Lange, 18 Wall. 163.

"The refusal to grant any of these rights go to the jurisdiction of the Court, and if the Court has jurisdiction it loses it by denying these rights in disobedience of the Constitution; or rather, the trial ceases to be a legal trial by a deprivation of these rights. Therefore when any constitutional right or immunity of a person is violated the judgment of the Court is void."

Ex parte Wilson, 114 U. S. 417.

"It is difficult to see why a conviction and punishment under an unconstitutional law is more violation of a person's constitutional rights than an unconstitutional conviction under a valid law." Under this rule if a Court errs in assuming jurisdiction when it does not have it, or in interpreting a constitutional immunity or right secured thereby against a prisoner, or in refusing him a right, the jurisdiction ceases, and its acts are not simply erroneous, but void.

In re Converse, 137 U. S. 624.

Hans Nielsen, 131 U. S. 176.
Brown's Jurisdiction, Sec. 97.
In re Lane, 135 U. S. 443.

(53). That the Supreme Court of Colorado, if it ever had any jurisdiction over these causes, lost it, and the judgments of affirmance made by the three Justices of that Court are void, for these reasons:

(54). (1) That the writ of error removed said causes to the Colorado Supreme Court. That, at all times since said removal by writ of error, said Supreme Court consisted of seven Judges.

(55). (2) That the Supreme Court of Colorado submitted said causes to three Justices of said Court for hearing and decision.

(56). (3) That on the 5th of May, 1918, these three Justices affirmed the convictions in these causes.

(57). (4) That in said State of Colorado there was and is not any other constituted Court to review criminal cases, but the said Supreme Court consisting of seven Justices.

(58). (5) That the laws of Colorado provide and command as follows, namely (Section 2000, Statutes of Colorado, 1908):

> "No punishment shall be inflicted in any case brought before the Supreme Court under the provisions of this chapter, unless the majority of the Justices of said Court concur in respect to such punishment."

(59). (6) That the statutes of Colorado of 1908 were brought into existence by an enactment of the Colorado Legislature on April 9th, 1907.

(60). (7) That Section 6303 of the statutes of Colorado, 1908, provide that Mills' Annotated Statutes of Colorado shall be received in all courts and proceedings, and by all officers of this State, as prima facie evidence of the originals, and

(61). That Mills' Annotated Statutes of Colorado, at Section 2127, contains the same identical law,

(62). That the Supreme Court had no authority or jurisdiction to submit said causes to three Judges of said Court. In criminal causes this may not be done under the laws of said State.

(63). That in such submission the Supreme Court lost jurisdiction, if ever any it had, and

(64). That the judgments and orders of the three Honorable Justices are illegal and void, and the District Court was without authority to commit the petitioner to said penitentiary, and is now under an unlawful restraint.

(65). That the judgment and sentences are illegal and void in not responding to the provisions of law provided therefor, in this:

(1) The sentences provide for not less than six and not more than eight years in solitary confinement at hard labor.

(2) The laws of Colorado provide for a minimum and maximum indeterminate sentence and permits the Court to add hard labor.

(66). This judgment is illegal, compounded and inseparable and the petitioner should be discharged, for the final process must respond to the statutes' requirements.

In re Medley, 134 U. S. 160.
In re Bonner, 151 U. S. 256.
Brown's Jurisdiction, Sec. 98.

Howe's Jurisdiction, Sec. 178.
Ex parte Milligan, 4 Wall. 107.

No lawful thing founded upon a wrongful act can be supported.

In re Allen, 13 Blatchford 271.
Isley vs. Nichols, 12 Pickering 270.
In re Robinson, 8 L. R. A. 398.
Kansas vs. Simmons, 39 Kans. 262.
Van Horn vs. Great, etc., 37 Kans. 523.

"A party is entitled to habeas corpus not merely where the Court is without jurisdiction of the cause, but where it has no constitutional right to condemn the prisoner, as said by Baron Gilbert, quoted in Parks case, 93 U. S. 18: 'If the commitment be against law as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the courts are to discharge.'"

This was said in reference to a case gone to conviction and sentence. Lord Hale laid down same doctrine in almost the same words.

2 Hales Pleas of the Crown, 144.

And why should not such a rule prevail in favor of liberty? If we have seemed to hold the contrary in any case, it has been from inadventance.

Hans Neilsen, 131 U. S. 176.

JURISDICTION.

(67). The reason the petitioner comes directly to this Court for relief is, in this, namely:

That he is now suffering the pains of imprisonment and has done so since about January 6th, 1919. That the courts of Colorado deny any further and all procedure

for relief. That he desires the quick and final judgment of this Honorable Court and to avoid delays and appeals and be compelled to endure further punishment awaiting a decision. And further that if this Court in its wisdom sees proper to grant the writ certiorari will bring up the record from the Supreme Court of Colorado.

(68). If an application was made to the Federal District Court for and denied, the petitioner would be detained in imprisonment during the delays of an appeal either to the Supreme Court or the Circuit Court of Appeals, as the law and fact might require and permit, and be compelled to suffer a longer confinement.

(69). Then again, the consideration is quick and final and concluded further efforts and a tiresome suspense, trusting to the getting relief from restraint. That certiorari will not bring the records from the State Court to the Federal District Court if required.

(70). A writ of error cannot be had, as the record does not show any Federal questions involved in the trial court, and not until the rehearing petition was presented does this appear, and this petition was denied without any discussion or opinion by the three Justices of the Supreme Court of Colorado.

(71). The facts of conspiracy and perjury set forth in the petition as existing between the District Attorney A. B. Wallis and the complaining witnesses, Tillie A. and Minnie A. Triede, and other persons, to charge the petitioner with a crime and arrest him, and if he did not pay to the District Attorney the locating fees paid petitioner by the said Thiedes the District Attorney would convict him for the offense charged.

(72). This matter was not known by petitioner until after the affirmance of conviction of the said three Jus-

tices of the Colorado Supreme Court; was never in the Bill of Exceptions, and the three Judges aforesaid refused to permit the petitioner to amend and supplement the record with this new matter that was unknown at the trial as a fact. The petitioner knew the charge was false and the evidence of the two witnesses that uncorroborated convicted him was untrue, but could not establish it then as a fact.

(73). The action of the three Justices in denying petitioner's motions "G" and "H" in the petition, prevents this petitioner assigning errors invading his constitutional and fundamental rights by writ of error to this Court.

All of which is respectfully submitted.

(74). Wherefore, the petitioner prays leave of the Court to file his petition in the office of the clerk of this Honorable Court, and that an order to show cause issue, directly to Thomas J. Tynan, Warden of the State Penitentiary for Colorado, at Cannon City, Colorado, to show cause forthwith, if any he has, why a writ of habeas corpus should not issue for the discharge of the petitioner.

C. M. ONEILL,

Attorney for Petitioner.

CASE INDEX

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EX PARTE TRACY, PETITIONER.

MOTION FOR LEAVE TO RENEW APPLICATION FOR WRIT OF HABEAS CORPUS IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. —, Original. Motion submitted April 21, 1919.—Decided April 28, 1919.

Where this court denies leave to file a petition for *habeas corpus*, because of the competency of other courts to afford the relief sought, a motion for leave to apply for the writ to the District Court will be denied as superfluous.

Motion denied.

The case is stated in the opinion. (See also *post*, 588.)

Mr. C. M. Oneill for petitioner.

PER CURIAM:

For the purpose of redressing assumed violations of the Constitution and laws of the United States by means of *habeas corpus*, the jurisdiction of other competent courts to afford relief may not be passed by and the original jurisdiction of this court be invoked, in the absence of exceptional conditions justifying such course. *Matters* v. *Ryan*, *ante*, 375.

When leave to file the petition for *habeas corpus* was previously denied, without a suggestion as to the existence of any exceptional condition which would have justified a contrary view, such refusal presumably was based on the existence of the right to seek, if desired, other and appropriate sources of relief. From this it follows that although we pass the application of the doctrine, that the refusal of *habeas corpus* is not the thing adjudged precluding a subsequent granting of such writ

upon the same facts, nevertheless there is here no reason to grant the order prayed, since the previous order rested upon the right and duty to petition for relief, if *habeas corpus* was desired, to other and appropriate sources of judicial power.

No reason, therefore, exists for granting the motion and to avoid any implication of a necessity which does not obtain, the motion is

Denied.